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Nos. 08-289, 08-294

In the
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT, ARIZONA PUBLIC INSTRUCTION
Petitioners

v.

MIRIAM FLORES, *ET AL.*,
Respondents

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, *ET AL.*,
Petitioners

v.

MIRIAM FLORES, *ET AL.*,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of the American Unity Legal Defense Fund, English Language Political Action Committee, ProEnglish and the Center for Equal Opportunity, As *Amici Curiae* Supporting Petitioners

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Questions Presented

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.

2. Whether compliance with the No Child Left Behind Act's extensive requirements for English-language instruction is sufficient to satisfy the Equal Educational Opportunities Act's mandate that States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

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INTEREST OF AMICI

The American Unity Legal Defense Fund is an independent, national, non-profit educational organization dedicated to preserving our historical unity as Americans into the 21st Century.[1] www.americanunity.org. AULDF has filed *amici curiae* briefs in this Court, including in *Mohawk Industries v. Williams*, No. 05-465 (brief of the Immigration Political Action Committee and five other organizations), and *Crawford v. Marion County Election Board*, Nos. 07-21, 07-25.

The English Language Political Action Committee is an independent, bipartisan national committee devoted to promoting English as the Official Language.

ProEnglish is a member-supported, national, non-profit organization working to educate the public about the need to protect English as our common language and to make it the official language of the United States. www.proenglish.org. ProEnglish has been active in the courts, including providing essential support to proponents of an Arizona initiative to make English the official language. *Arizonans for Official English v. Arizona*, No. 95-974.

The Center for Equal Opportunity is a national, non-profit organization which opposes

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amici curiae* or their counsel made such a monetary contribution. All parties have consented to the filing of this brief.

bilingual education, because it segregates students by national origin, encourages identity politics, and fails to teach children English. www.ceousa.org. CEO has assisted parents of English Language Learners to challenge ineffective bilingual education programs in several states.

PRELIMINARY STATEMENT

The decision below rests on two fundamental errors:

- A misunderstanding and misapplication of the *Castaneda* test long used to evaluate claims under the Equal Educational Opportunities Act ("EEOA"); and,
- A misunderstanding of the relationship between the EEOA and Title III of the No Child Left Behind Act ("NCLB").

Both errors, described in more detail below, stem from the failure of the Ninth Circuit to understand the evolution in methods for teaching English Language Learners. Demonstrating the errors requires a brief description of the three-decade-long movement from "bilingual education" to more effective English Immersion instruction.

"[T]he debate is a neutral one, about which system will provide LEP [Limited English Proficient] children with the best education to enable them to function as American citizens and enjoy the opportunities and privileges of life in the United States." *Valeria v. Davis,* 307 F.3d 1036, 1041 (9th Cir. 2002), *quoting*, *Valeria G. v. Wilson,* 12 F.Supp.2d 1007, 1014-15 (N.D. Cal. 1998) ("This court cannot discern from the face of Proposition 227 any hidden agenda of racial or national origin discrimination against any group").

The movement from "bilingual education" to "English language acquisition" is, to the leading authorities, a civil rights and enabling issue:

> Without competence in the standard language of the society, immigrants . . . are at a disabling disadvantage, unable to share in the economic opportunities of a democratic society. . . . The sooner this enabling skill is acquired, the sooner children can join in the full life of their school and community.

Rosalie Pedalino Porter, FORKED TONGUE: THE POLITICS OF BILINGUAL EDUCATION, 2nd ed. (1996), at 254.

A. "Bilingual Education:" Teaching English Language Learners in Their Native Languages:

Before *Lau v. Nichols*, 414 U.S. 563 (1974), efforts to teach English Language Learners were haphazard or non-existent. In *Lau*, for example, this Court noted that of 2,856 children of Chinese ancestry in the San Francisco school system who did not speak English, 1,800 received no supplemental instruction to teach them English. *Lau*, 414 U.S. at 564. California law at the time provided for assistance to those who could not speak English, but at the discretion of the school system. 414 U.S. at 565.

Justice Douglas, writing for the Court, found that the failure to provide at least some assistance violated Section 601 of Title VI of the Civil Rights Act of 1964, because it "denies them a meaningful opportunity to participate in the educational program." 414 U.S. at 568. This Court did not

mandate any particular form of assistance for language-minority children:

> No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.

414 U.S. at 564-65.

One early attempt at teaching English Language Learners was "bilingual education." "'Bilingual education/native language instruction' means a language acquisition process for students in which *much or all instruction, textbooks, or teaching materials are in the child's native language* other than English." A.R.S. § 15-751.1 (2008) (emphasis added).

"Bilingual programs make use of students' native language in the classroom while developing English." Arizona Dept. of Education, *The Effects of Bilingual Education Programs and Structured English Immersion Programs on Student Achievement: a Large-Scale Comparison*, July 2004, at 1.

B. Bilingual Education Was Preferred by Federal Policies, But Proved Largely Ineffective:

In the Bilingual Education Act of 1974, 20 U.S.C. § 880b *et seq.* (1976), Congress expressly directed that the state and local agencies receiving funds under the Act were free to develop their own

programs. Conf.Rep. No. 93-1026, 93d Cong., 2nd Sess. (1974), *reprinted* in (1974) U.S.Code Cong. & Ad.News 4093, 4206.

The federal Department of Health, Education and Welfare, however, issued the so-called "*Lau* Guidelines," which promoted the use of bilingual education. "Following the Supreme Court's decision in *Lau*, HEW developed the '*Lau* Guidelines' as a suggested compliance plan for school districts which, as a result of *Lau*, were in violation of Title VI because they failed to provide any English language assistance to students having limited English proficiency." *Castaneda v. Pickard*, 648 F.2d 989, 1006 (5th Cir. 1981) ("*Castaneda*"). "Under the *Lau* Guidelines, plaintiffs argue, 'pressing English on the child is not the first goal of language remediation.'" *Id.*

> The *Lau* Guidelines were the result of a policy conference organized by HEW; these guidelines were not developed through the usual administrative procedures employed to draft administrative rules or regulations. The *Lau* Guidelines were never published in the Federal Register. Since the Department itself in its administrative decision found that RISD's [the Raymondville Independent School District's] departure from the *Lau* Guidelines was not determinative of the question whether the district complied with Title VI, we do not think that these guidelines are the sort of administrative document to which we customarily give great deference in our determinations of compliance with a statute.

Id.

Nevertheless, most federal funding and school system pedagogical decisions assumed the *Lau* Guidelines as a federal mandate, and suits, including the landmark *Castaneda* case, were brought alleging violations of the Guidelines. *Id.*

Over time, these bilingual education programs proved inadequate to teaching children either English or subject matter. In 1981, the U.S. Department of Education concluded that "the case for the effectiveness of 'Transitional Bilingual Education' is so weak that exclusive reliance on this instructional method is clearly not justified." Keith Baker, *et al.*, *Effectiveness of Bilingual Education: A Review of the Literature*, Technical Analysis Report Series, U.S. Dept. of Education, at 8 ("Dept. of Education Study").

In 1985, the Massachusetts Board of Education concluded that "it appears that bilingual programs *both* segregate them *and* fail to teach a substantial proportion of them the skills which, according to the *Lau* decision, are essential." Commonwealth of Massachusetts Board of Education, *Report No. 5 to the United States District Court, District of Massachusetts on Boston School Desegregation*, Vol. 2, July 15, 1985, at 74 (emphasis in original).

In 1992, a California State study examined 20 years of bilingual education, and found no evidence that native language instruction is beneficial, and also found that students are kept in bilingual education programs for too many years. Paul Berman, *et al.*, *Meeting the Challenge of Language Diversity: An Evaluation of Programs for Pupils of Limited Proficiency in English*, BW Associates, Berkeley, California, 1992, at 38.

In 1994, the Massachusetts Bilingual Education Commission analyzed 23 years of bilingual

education, and concluded that there was no evidence that "transitional bilingual education" programs produced good results. Massachusetts Bilingual Education Commission, *Striving for Success: The Education of Bilingual Pupils: A Report of the Bilingual Education Commission,* Boston, 1994.

In 1996, the Rossell/Baker study analyzed 76 reliable research studies on bilingual education, concluding there is no evidence that bilingual education programs are superior for teaching either English or subject matter. Christine Rossell, et al., *Bilingual Education in Massachusetts: The Emperor Has No Clothes*, Pioneer Institute, Boston, Massachusetts, 1996 ("Rossell").

In 1998, the National Research Council of the National Institutes of Medicine reviewed 29 years of bilingual education and concluded that there was no long-term advantage in teaching literacy in a child's native language and no negative effects from teaching English language literacy first. Commission on Behavioral and Social Sciences and Education, National Research Council, Institutes of Medicine *Educating Language Minority Children*, National Academy Press, Washington, D.C., 1998.

C. Some Schools Introduced New "English Immersion" Teaching Methods:

Some schools began using an alternative method of instruction: "immersing" the students in English, and providing special assistance in other languages only when needed. In 1981 the U.S. Department of Education described the rationale:

> The commonsense observation that children should be taught in a language they

> understand does not necessarily lead to the conclusion they should be taught in their home language. They can be successfully taught in a second language if it is done right. The key to successful teaching in the second language seems to be to insure that the second language and subject matter are taught simultaneously so that subject content never gets ahead of language. Given the American setting, where the language-minority child must ultimately function in an English-speaking society, carefully conducted second-language instruction in all subjects may well be preferable to bilingual methods.

Dept. of Education Study, at 8.

A 1996 Massachusetts review of 76 studies describes the English Immersion classroom:

> The language of instruction in a structured immersion program is English at a level the child can understand in a self-contained classroom of LEP students who are at approximately the same level of English language knowledge and the same age. The children in a structured immersion classroom do not have to be of the same language background, but the teacher should be trained in second language acquisition techniques. These programs should be fully integrated into regular schools so that students are exposed to English speakers on the playground, in the cafeterias, the halls, assemblies, and other areas before, during, and after school. LEP students should probably not remain in self-contained classrooms for more than a year, even if the language of instruction is English.

Rossell, *supra*, at 9.

Arizona law, enacted by Proposition 203,[2] defines one such method, known as Structured English Immersion ("SEI"):

> "Sheltered English immersion" or "structured English immersion" means an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language. Books and instructional materials are in English and all reading, writing, and subject matter are taught in English. Although teachers may use a minimal amount of the child's native language when necessary, no subject matter shall be taught in any language other than

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[2] "Proposition 203 largely abolished bilingual education, replacing it with sheltered English immersion, a teaching method 'in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language.'" *Flores v. Arizona*, 516 F.3d 1140, 1149 (9th Cir. 2008).

Contrary to the lower court's assertion about bilingual education being "abolished," bilingual education teaching methods are still available in Arizona. A.R.S. §§ 15-752, 15-753 (2000). Structured English Immersion ("SEI") is the default instructional method; children who obtain waivers, based on educators' evaluations and parental consent, may be placed in bilingual education classrooms. *Id.* Approximately 7,900 students obtained waivers and participated in bilingual education programs in the 2002-03 academic year. Arizona Dept. of Education, *The Effects of Bilingual Education Programs and Structured English Immersion Programs on Student Achievement: a Large-Scale Comparison*, July 2004. ("Arizona Student Achievement Study"), at Table 1, P. 5. More than 65,000 students participated in SEI programs. *Id.*

> English, and children in this program learn to read and write solely in English.

A.R.S. § 15-751.5 (2008).

D. Structured English Immersion Proved More Successful Than Bilingual Education:

In 1992, the Research in English Acquisition and Development Institute studied El Paso, Texas's, "Bilingual Immersion Project," and found that, over the ten-year study period, Limited English Proficiency children in English immersion classes consistently outperformed children in native language instruction classes in both learning English and in subject matter. Russell Gersten, *et al.*, *Bilingual Immersion: A Longitudinal Study*, READ Institute, Washington, D.C. 1992.

In 1994, the New York City Board of Education found that students in English as a Second Language classes (similar to immersion programs) exited their special program faster and did better in mainstream classrooms than students taught in their native language. New York City Board of Education, *Educational Progress of Students in Bilingual and ESL Programs: a Longitudinal Study, 1990-1994.*

The Arizona Department of Education reported that, in academic year 2002-03, "[T]hose students in SEI programs significantly outperformed bilingual students in 24 out of 24 comparisons. . . . [B]ilingual students are more than a year behind their SEI counterparts in seventh and eighth grade." Arizona Student Achievement Study, at 3.

Similar results were achieved in California.

> California made headlines across the country when test scores were released after the passage of Proposition 227. Opponents of the law had predicted it would spell disaster for English learners. But quite the opposite occurred. Only a quarter of English learners scored in the top two proficiency categories on the California English Language Development Test (CELDT) in 2001, shortly after Proposition 227 was implemented, and the first year the exam was given. By 2005, almost half did – 47 percent.

Kelly Torrance, *Immersion Not Submersion: Lessons from Three California Districts' Switch From Bilingual Education to Structured Immersion*, Vol. II. Lexington Institute, Arlington, VA, 2006, at 4.

In addition, those who completed the program sometimes outdid native English-speakers in test performance.

> A larger group of students start as English Learners but achieve proficiency, making them Reclassified Fluent English Proficient (RFEP). These students "do just as well as, and, in some cases, even better than non-EL students on every state standardized academic test, including the California Standards Test, the Stanford Assessment Test and the California High School Exit Exam," notes the 2007 Evaluation Report on the California High School Exit Exam (CAHSEE) by Human Resources Research Organization.

Joanne Jacobs, *The Education of J*A*I*M*E C*A*P*E*L*L*A*N: English Learner Success in California Schools*. Lexington Institute. Arlington, VA, 2008, at 5.

"Remarkably, 52 percent of reclassified students passed the college-prep courses required by the University of California and California State University systems in 2003, compared to only 32 percent of students who speak English as their first language." *Id.*, at 7.

E. Parents and Educators Began Rejecting Bilingual Education Programs and Advocating for English Immersion Programs:

Given these dramatic differences in success rates, it was inevitable that parents and caring educators began clamoring for more successful programs for English Language Learners. "Over the past few years, the Committee has heard a growing number of complaints from parents whose children have been placed and retained in bilingual education courses without their permission or knowledge. In many instances, these parents faced great resistance in their efforts to remove their children from such programs." Comm. On Ed. & the Work Force, "No Child Left Behind Act of 2001," H.R. Rep. 107-63, Pt. 1, at 277.

One was Rita Montero, a member of the Denver, Colorado, School Board, and once a supporter of bilingual education, who changed her view: "As a mother whose child was forced to stay in this program, I know its problems first-hand."[3] Montero's son, Camilo, was put into a bilingual education class, at her request. Her second-grade son had been doing

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[3] Rita Montero, "A Tale of Two Tongues," *Denver Post*, May 25, 1997.

fractions and adding three digit numbers, but his bilingual education class was far behind Camilo's capabilities: "So I said to the teacher this is it; I want him to be taken out and put in an English-speaking class."[4]

Similar parent and educator disquiet over bilingual education's failures led to successful voter initiatives in California (1998), Arizona (2000), and Massachusetts (2002):

> Well, the overwhelming practical evidence is that bilingual education has failed on every large scale case that's been tried in the United States, in particular in California. The origins of this initiative was the case last year of a lot of immigrant Latino parents in downtown LA, who had to begin a public boycott of their local elementary school to try to force the school to give their children the right to be taught English, which the school was denying.

"Double Talk," *supra* (Statement of Ron Unz). The Ninth Circuit repeatedly upheld California's Proposition 227. *Valeria v. Davis*, *supra*; *Calif. Teachers Ass'n v. State Bd. Of Ed.*, 271 F.3d 1141 (9th Cir. 2001).

The California reform movement stimulated Arizona's Proposition 203, which passed with 63% of the vote on the Nov. 2000 ballot. Daniel Gonzalez, "Arizona Win Encourages Bilingual Ed Opponents," *Arizona Republic*, Nov. 20, 2000, A-1.

In 2002, Massachusetts voters adopted Question 2 by a vote of 68% to 32% of those voting.

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[4] PBS Online Newshour, "Double Talk," *Newshour Transcript*, Sept. 21, 1997 ("Double Talk").

Elections Division, State of Massachusetts, "Massachusetts 2002 Election Ballot Question Results".

> Lincoln Jesus Tamayo, statewide chair of English for the Children of Massachusetts, argued that a ballot initiative was the only solution. "As a Latino immigrant child who arrived in America speaking no English, I know the importance of learning that language. As a high school principal, I have seen the dismal results of our current so-called bilingual programs, which teach English much too slowly. And as Chairman of the Massachusetts Bilingual Education Advisory Council, I recognized the hopelessness of legislative efforts to reform this dreadful system of Spanish-only instruction. We've already lost too many generations of Latino students; the 'English for the Children' initiative is their only chance."
>
> The views of Mr. Tamayo were seconded by those of Co-Chair Rosalie Pedalino Porter, herself an immigrant child, former director of bilingual programs for Newton, MA, and author of *Forked Tongue*, a powerful critique of bilingual education. "I learned English as a child in school, but was later forced to administer a system which prevented other immigrant children from doing the same. After wasting fifteen years trying to reform bilingual programs, I've decided we must end them instead."

English for the Children of Massachusetts, *Ballot Initiative Campaign Launched to Dismantle Bilingual Education in Massachusetts*, July 31, 2001.

F. Federal Policy Preferences Changed to Favor English Language Acquisition:

This evolution in teaching methods gradually penetrated federal policy, leading to the end of policies and "*Lau* guidelines" preferring bilingual education. In 2001, Congress enacted Title III of the No Child Left Behind Act, Pub.L. No. 107-110, 115 Stat. 1425 ("NCLB").

The NCLB reversed the federal educational priorities for English Language Learners and promoted English language acquisition. *See, e.g.*, Section 1072 of NCLB, replacing "Office of Bilingual Education and Minority Languages Affairs" and "Office of Bilingual Education" in the Department of Education Organization Act (20 U.S.C. 3401 *et seq.*), with "Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students".

> Yet we know what happened to bilingual education. It got off track. Instead of kids learning English, we ended up isolating kids, took them on a train track that took them to their language and left them there, put them in schools and classrooms where they basically were being taught in their language and they were not being allowed to learn English essentially, or they were not being asked to learn English.

147 Cong. Rec. S13328 (Dec. 17, 2001)(Statement of Sen. Gregg).

The new Title III of NCLB requires federal grantees "to help ensure that children who are limited English proficient, including immigrant

children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1).

Thus, where "[u]nder the *Lau* Guidelines, plaintiffs argue, 'pressing English on the child is not the first goal of language remediation'," *Castaneda*, 648 F.2d at 1006, under Title III of the NCLB, attaining English proficiency was the first goal. 20 U.S.C. § 6812(1).

The U.S. Department of Education describes the new NCLB requirements for schools as:

> School districts must use Title III funds to provide high-quality language instruction programs that are based on scientifically based research, and that have demonstrated that they are effective in increasing English proficiency and student achievement.
>
> Districts are required to provide high-quality professional development to classroom teachers, principals, administrators, and other school or community-based organizational personnel in order to improve the instruction and assessment of limited English proficient students.
>
> Districts are held accountable for making adequate yearly progress as described in Title I and meeting all annual achievement objectives.

U.S. Dept. of Education, "Title III – Language Instruction For Limited English Proficient And Immigrant Students Language Instruction for Limited English Proficient and Immigrant Students

(III)," *No Child Left Behind: A Desktop Reference* ("NCLB Desktop Reference").

Thus, America's methods for teaching English Language Learners have moved beyond ineffective bilingual education programs measured by "process" or "inputs", toward a result-oriented test of whether children are succeeding. The decision below missed this evolution:

> If anything, after 2000, when Arizona moved away from bilingual education and required most courses to be taught in English, regardless of students' language abilities, these challenges have become greater: a tenth grader, for example, who speaks no English but must pass a biology course taught entirely in English will require considerable assistance.

516 F.3d at 1169.

This statement, central to the Ninth Circuit's belief that more resources were necessary, does not reflect an understanding of the Structured English Immersion program, or its results. The essence of SEI programs is that students are given the assistance necessary, but based on an individual student's needs, not on an assumption that the student will not do well in an English-language curriculum.

SUMMARY OF ARGUMENT

The Ninth Circuit decision below made two fundamental errors:

- misunderstanding and misapplying the *Castaneda* test long used to evaluate claims under the Equal Educational Opportunities Act; and,

- misunderstanding Title III of the No Child Left Behind Act, and misapplying the relationship between the EEOA and Title III.

Both errors stem from the same root: a failure of the Ninth Circuit to understand the evolution in methods for teaching English Language Learners, described *supra*.

The three-part *Castaneda* test was formulated to permit courts to evaluate claims under the Equal Educational Opportunities Act, the post-*Lau* effort to insure that school systems made a "good faith" effort to assist English Language Learners. The Ninth Circuit attempted to apply the *Castaneda* test in this case, but did not understand it. As a result, the Ninth Circuit changed the *Castaneda* test from one focused on results, to one measuring inputs. Because demands for more money are limitless, this change mires the Ninth Circuit in inappropriate legislative decision-making, and contradicts the evolution of teaching methods now reflected in federal law.

In addition, the Ninth Circuit distorted and mis-applied the results test which is explicitly part of the *Castaneda* test. The lower court recited, but dismissed evidence that Arizona is achieving the kind of results sought in the No Child Left Behind Act and the EEOA.

Similarly, the decision below misunderstood the relationship between the EEOA and Title III of the NCLB. In the context of the evolution of teaching methods, described *supra*, Title III of the NCLB can be seen as the legislative ratification of the three-part *Castaneda* test. In particular, both the third prong of the *Castaneda* test and Title III require measurable results. The Ninth Circuit could not connect the two results tests, even though they are essentially the

same. Thus, the Ninth Circuit not only failed to understand the *Castaneda* test and how it applies to Arizona's program, but also how the EEOA and Title III harmonize toward the same goal.

Adopting the Ninth Circuit's new formulation of the EEOA might resurrect one of the chief criticisms of ineffective bilingual education programs: that they keep English Language Learners segregated longer than necessary, not only slowing their English language acquisition but impeding their ability to learn school subjects taught in English. Schools which see ELL assistance programs as means to squeeze additional funds out of reluctant legislatures would feel pressure to keep the students in the programs longer. This would mean that the Ninth Circuit would be promoting exactly what it purports to solve: keeping English Language Learners away from English proficiency.

ARGUMENT

I. THE DECISION BELOW DISTORTS AND MISAPPLIES THE *CASTANEDA* TEST.

A. The Equal Educational Opportunities Act:

The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f), says, in relevant part: "No State shall deny equal educational opportunity to an individual . . . by – (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

The legislative history of the EEOA "is very sparse, indeed almost non-existent." *Castaneda*, 648 F.2d at 1001. "The EEOA was a floor amendment to the 1974 legislation amending the Elementary and Secondary Education Act of 1965, 88 Stat. 338-41." *Id.*

The interpretation of Section 1703(f) has generally centered on the requirement that schools take "appropriate action to overcome language barriers."

> The difficult question presented by plaintiffs' challenge to the current language remediation programs in RISD is really whether Congress in enacting § 1703(f) intended to go beyond the essential requirement of *Lau*, that the schools do something, and impose, through the use of the term "appropriate action" a more specific obligation on state and local educational authorities.

Castaneda, 648 F.2d at 1008.

In *Serna v. Portales Municipal Schools*, 351 F.Supp. 1279 (D.N.M.1972), *aff'd on other grounds*, 499 F.2d 1147 (10th Cir. 1974), the district court found an unconstitutional denial of equal educational opportunity. The Tenth Circuit affirmed the decision on the non-constitutional ground of Section 601 of Title VI. The court further stated that because Section 601 gives a right to bilingual instruction, bilingual-bicultural education can be ordered. 499 F.2d at 1154.

The Tenth Circuit, in *Keyes v. School District No. 1*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976), criticized *Serna*, refused to order bilingual-bicultural education as a remedy, and

expressly held that a specific program of bilingual-bicultural education was not required by the Fourteenth Amendment. On the other hand, in *United States v. Texas Education Agency*, 532 F.2d 380, 398 (5th Cir.), *vacated sub nom. Austin Independent School District v. United States*, 429 U.S. 990 (1976), a certain form of bilingual-bicultural education was held to be a proper part of a remedy fashioned by the district court to eliminate de jure segregation. A similar holding where de jure segregation had existed was made in *United States v. Texas*, 342 F.Supp. 24 (E.D.Tex.1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972).

The early judicial analysis and application reached perhaps its deepest point in *Guadalupe Organization, Inc. v. Tempe Elementary School Dist. No. 3*, 587 F.2d 1022 (9th Cir 1978). In *Guadalupe*, the Ninth Circuit was asked whether *Lau* and the HEW guidelines required Tempe, Arizona, "to provide all non-English-speaking Mexican-American or Yaqui Indian students attending district schools with bilingual-bicultural education" which, *inter alia*, "reflects the historical contributions of people of appellants' descent to the State of Arizona and the United States." *Guadalupe*, 587 F.2d at 1024.

The Ninth Circuit rejected the request for bilingual-bicultural education:

> We hold that the appellees fulfilled their equal protection duty to children of Mexican-American and Yaqui Indian origin when they adopted measures, to which the appellants do not object, to cure existing language deficiencies of non-English-speaking students. There exists no constitutional duty imposed by the Equal Protection Clause to provide

> bilingual-bicultural education such as the appellants request.

587 F.2d at 1026-27. The Ninth Circuit similarly rejected claims under Section 601 of the Civil Rights Act of 1964 and under the EEOA. 587 F.2d at 1029-30.

The Ninth Circuit explained:

> Whatever may be the consequences, good or bad, of many tongues and cultures coexisting within a single nation-state, whether the children of this Nation are taught in one tongue and about primarily one culture or in many tongues and about many cultures cannot be determined by reference to the Constitution. We hold, therefore, that the Constitution neither requires nor prohibits the bilingual and bicultural education sought by the appellants. Such matters are for the people to decide.

587 F.2d at 1027.

B. The Fifth Circuit Crafted a Three-Part *Castaneda* Test to Evaluate EEOA Claims:

In 1981, the Fifth Circuit handed down the landmark decision in *Castaneda v. Pickard,* 648 F.2d 989 (5th Cir. 1981). The Raymondville, Texas, bilingual education program offered intensive language instruction, in addition to bilingual content instruction, for the first three years. "The articulated goal of the program is to teach students fundamental reading and writing skills in both Spanish and English by the end of third grade." 648 F.2d at 1004-

05. After the third grade, all instruction was in English, with teachers' aides and other assistance for language-minority children. Special programs, including English as a Second Language and special tutoring, were available to all children, with special emphasis on students who moved into the school district after the third grade. 648 F.2d at 1005.

The plaintiffs asserted that the Raymondville program did not comply with the requirements of Title VI, the EEOA, and the *Lau* Guidelines. 648 F.2d at 1006. "Specifically, plaintiffs contend that the articulated goal of the Raymondville program to teach limited English speaking children to read and write in both English and Spanish at grade level is improper because it overemphasizes the development of English language skills to the detriment of the child's overall cognitive development." *Id.*

The Fifth Circuit first swiftly disposed of the Title VI and *Lau* Guidelines questions.

> Whatever the deficiencies of the RISD's program of language remediation may be, we do not think it can seriously be asserted that this program was intended or designed to discriminate against Mexican-American students in the district. Thus, we think it cannot be said that the arguable inadequacies of the program render it violative of Title VI.

648 F.2d at 1007.

The Fifth Circuit then turned to the EEOA question:

> We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in

> choosing the programs and techniques they would use to meet their obligations under the EEOA. However, by including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation in § 1706, Congress also must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.

648 F.2d at 1009.

The Fifth Circuit then formulated a three-part test which has guided reviews of bilingual education programs since its formulation:

> In a case such as this one in which the appropriateness of a particular school system's language remediation program is challenged under § 1703(f), we believe that the responsibility of the federal court is threefold. First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. . . .
>
> The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. We do not believe that it may fairly be said that a school system is taking appropriate action to

> remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.
>
> Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. We do not believe Congress intended that under § 1703(f) a school would be free to persist in a policy which, although it may have been "appropriate" when adopted, in the sense that there were sound expectations for success and bona fide efforts to make the program work, has, in practice, proved a failure.

648 F.2d at 1009-10.

The *Castaneda* test continues to be the benchmark for evaluating challenges to programs to aid English Language Learners. The Fifth Circuit later applied the *Castaneda* test to a statewide

system. *United States v. Texas*, 680 F.2d 356, 371 (5th Cir. 1982). The Seventh Circuit similarly applied the *Castaneda* test. *Gomez v. Illinois State Bd. Of Education*, 811 F.2d 1030, 1041-42 (7th Cir. 1987) (EEOA applies to state as well as local agencies).

The plaintiffs and the court below used the *Castaneda* test in this case. "Flores alleged, consistent with *Castaneda* step two, that Arizona had 'failed to provide financial and other resources necessary for adequate implementation' of its ELL programs." 516 F.3d at 1146.

C. The Decision Below Distorts and Misapplies the *Castaneda* Test:

The lower court's opinion misquotes and misunderstands the *Castaneda* test. Because the court below apparently did not understand the Fifth Circuit's careful analysis in *Castaneda*, its additions converted a "good faith" test into a numerical "resources" test, placing the court in the position of dictating appropriations, rather than evaluating a program.

The court below described the *Castaneda* test as:

> The *Castaneda* framework is three-fold: First, courts must be satisfied that the "school system is purs[uing] a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." *Castaneda*, 648 F.2d at 1009. Second, "the programs and practices actually used by a school system [must be] reasonably calculated to implement effectively the educational theory adopted by

> the school." *Id.*, at 1010. *There must, in other words, be sufficient "practices, resources and personnel ... to transform the theory into reality." Id.* Third, even if theory is sound and *resources are adequate*, the program must be borne out by practical results. *Id.*

516 F.3d at 1146 (emphases added).

The highlighted language is the Ninth Circuit's distortion of the *Castaneda* test. An analysis of the Arizona programs under the three *Castaneda* prongs illustrates the effect of this switch from substantive analysis to analysis of "process:"

1. ***THEORY:*** *Proposition 203 Adopted a Recognized Educational Theory.*

The first *Castaneda* test is whether the program uses a recognized educational theory. Arizona's Proposition 203 uses a theory proven successful in California, and very similar to that adopted two years later by Congress in Title III of the NCLB Act. No one in this case disputes that Arizona's educational theory is recognized.

2. ***"GOOD FAITH" IMPLEMENTATION:*** *Arizona Has Implemented the Program Appropriately.*

This second *Castaneda* prong is the crux of the plaintiffs' challenge in this case. 516 F.3d at 1146. The Ninth Circuit has converted the second prong of the *Castaneda* test from one focused on implementation of theory into a resources test. "ELL students need extra help and that costs extra money." 516 F.3d at 1169.

The Ninth Circuit, using its theory that "challenges have become greater" under Arizona's

SEI program, 516 F.3d at 1169, didn't recognize the differences between the old bilingual education program and more modern approaches. The Ninth Circuit excerpted the second prong of the *Castaneda* test to look to specific dollar inputs rather than good faith efforts:

> Second, "the programs and practices actually used by a school system [must be] reasonably calculated to implement effectively the educational theory adopted by the school." *Id.*, at 1010. *There must, in other words, be sufficient "practices, resources and personnel ... to transform the theory into reality."*

Id., emphasis added.

By removing words, the Ninth Circuit converted the second prong into a test of whether the theory could become "reality." This is a results test. The only way to keep the lower court's version of the second prong from being a superfluous results test would be if it were construed solely as an "inputs" test, similar to the old *Lau* Guidelines. Yet the *Castaneda* court, as noted above, summarily rejected the *Lau* Guidelines as a measure to judge compliance with the EEOA. 648 F.2d at 1007.

The futility of the Ninth Circuit's "resources" test can be seen in a comparison of the Nogales schools and those of "the more affluent Scottsdale Unified School District [which] spends more than twice as much money as does [Nogales] for its ELL students, yet Scottsdale's ELL 10th graders score worse on Arizona's AIMS academic achievement tests than [Nogales's] ELL 10th graders." Brief of Petitioner Superintendent ("Superintendent's Br.") at 43 n. 19. Adding more resources is not an adequate measure of implementation or of results.

The second prong is not, in fact, a resources test. It is a balancing test of implementation. What *Castaneda* actually said was that:

> Congress also must have intended to insure that schools made a *genuine and good faith effort, consistent with local circumstances and resources*, to remedy the language deficiencies of their students. . . .
>
> The court's second inquiry would be whether the *programs and practices* actually used by a school system are *reasonably calculated* to implement effectively the educational theory adopted by the school.

648 F.2d at 1009 (emphasis added).

Arizona has implemented its Structure English Immersion program appropriately. It has passed legislation to implement the voters' decision. 516 F.3d at 1167. Nogales schools score in the top ranks of Arizona schools. Pet. App., at 363a-366a. Even the Ninth Circuit notes that Arizona has changed its programs to meet the needs of its English Language Learners in these new programs. "[M]any of these specific problems have been solved by better management in NUSD, and because school funding has generally increased. . . ." 516 F.3d at 1168.

The *Castaneda* test is one of "genuine and good faith effort." The Ninth Circuit is familiar with "good faith" tests regarding the implementation of English Language Learner programs. *California Teachers Ass'n*, 271 F.3d at 1154-55 (upholding California's Prop. 227, in part, by looking at a variety of "good faith" tests).

The Ninth Circuit did not use its own "good faith" test, or the *Castaneda* "good faith implementation" test in this case. Perhaps the Ninth

Circuit believed that it could evaluate and disregard competing resource claims to satisfy the requirements of the EEOA, but having both ignored the evolution in education theory and practice and made a flawed assumption about the resources needed to implement English immersion programs, the Ninth Circuit was in no position to judge whether Arizona's effort was "genuine" or in "good faith." Thus, it had to look solely to a dollar-input test.

The difficulty with the "process mentality" below was predicted by the Fifth and Seventh Circuits:

> Among these are such questions as how broad a power of "de novo" review and revision may be exercised by a district court over language barrier programs, consistent with the rule that Congress cannot invest Article III courts with jurisdiction to "exercise functions which are essentially legislative or administrative."

Castaneda by Castaneda v. Pickard, 680 F.2d 456, 471 n. 24 (5th Cir. 1986); *Gomez*, 811 F.2d at 1041 ("we must be careful not to substitute our suppositions for the expert knowledge of educators or our judgment for the educational and political decisions reserved to the state and local agencies").

Demands for funds are endless. Schools can always find a reason to "need" more funds. Determining appropriations levels by balancing these competing demands is one of the "quintessentially legislative" functions. *Sorenson v. Secretary of Treasury of U.S.*, 475 U.S. 851, 865 (1986).

Because it failed to understand the nature of the second prong of the *Castaneda* test, the decision below both inappropriately muddied the test itself

and unnecessarily injected itself into legislative resources decisions. The *Castaneda* test was carefully drawn to avoid separation of powers issues while protecting English Language Learners; the Ninth Circuit's ambiguous rewrite was not.

3. ***RESULTS:*** *Arizona's SEI Program is Achieving Results Better Than Its Prior Bilingual Education Program.*

As shown by the long evolution of English Language Learner teaching, the third prong of the *Castaneda* test is perhaps the most important: does the program get results?

The EEOA does not establish measures for determining results. Title III of the No Child Left Behind Act does: "to help ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1).

Arizona does seem to be getting results. Arizona's ELLs who have successfully completed Arizona's new "Structured English Immersion" program perform better on tests of mathematics, and English language writing and reading skills than do native-English-speaking children. Accountability Division, Research and Evaluation Section, Arizona Dept. of Education, "State Report Cards," Dec. 29, 2008.

For example, in Fiscal Year 2007, 82% of ELLs in their second year of classification as English Proficient ("CFEP2") passed their Arizona

Instrument to Measure Standards ("AIMS") test in writing in English, compared to only 78% of native English speakers. *Id.* 71% of the CFEP2 students passed their AIMS math test, compared to 68% of native English speakers. *Id.* In Fiscal Year 2008, the achievement figures were comparable between ELLs and native speakers; for example, the AIMS pass rate for CFEP2 students was 72% in math, compared to 74% for native English speakers. *Id.*

The Ninth Circuit dismissed the evidence of success, putting these "encouraging" results in a footnote, 516 F.3d at 1170 n. 38, and claiming that "the record does not demonstrate that NUSD is succeeding in rapidly and permanently reclassifying ELL students, nor on the time it takes to reclassify students." 516 F.3d at 1170.

Instead, the lower court simply decried a lack of resources:

> A district in which the *majority* of ELL tenth graders fail to meet state achievement standards while the majority of native English speakers pass is not one whose performance demonstrates that the state is adequately funding ELL programs and so warrants relief from judgment.

516 F.3d at 1170 (emphasis in the original). Given the undisputed evidence that graduates of the program do as well or better than the "majority of English speakers", comparing those who haven't completed the program is premature at best. Otherwise, the lower court would be demanding instantaneous results.

Leaving aside the comparison between different groups, this conclusion doesn't seem to comport with the record. Pet. App., at 363a-366a

(Nogales Unified School District schools rank high on Arizona test scores); Brief for Petitioners ("Legislature's Br.") at 22, 45-46 (describing new programs and resources in Nogales schools), 48 (describing ELL performance on tests).

Again, the Ninth Circuit's position may be dictated by its misunderstanding and mischaracterization of the *Castaneda* test. The opinion below described the third prong as: "Third, even if theory is sound and resources are adequate, the program must be borne out by practical results." 516 F.3d at 1146.

This is not an accurate description, as it substitutes "resources are adequate" for what the *Castaneda* test actually measures:

> Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students *and made bona fide efforts to make the program work* does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and *implemented through the use of adequate techniques*, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.

648 F.2d at 1010 (emphasis added).

The *Castaneda* results test does not include the word "resources," nor does it measure whether "resources are adequate." Instead it measures whether Arizona has "made bona fide efforts to make the program work," and whether, after a reasonable period of time, the program was "implemented through the use of adequate *techniques*." Not adequate "resources," but "adequate techniques." And the essential test, described twice in one paragraph, is whether Arizona had made "bona fide efforts to make the program work."

The last sentence of the *Castaneda* third prong was not mentioned by the Ninth Circuit: "We do not believe Congress intended that under § 1703(f) a school would be free to persist in a policy which, although it may have been 'appropriate' when adopted, in the sense that there were sound expectations for success and *bona fide efforts to make the program work*, has, in practice, proved a failure." 648 F.2d at 1010 (emphasis added).

The *Castaneda* court sought "bona fide efforts" to ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet. This is the same standard set by the NCLB. This is also what language-minority parents have sought for many years, and, by the available evidence, this is what Arizona has apparently provided.

The lower court's failure to understand and apply the *Castaneda* test threatens to confuse schools and parents about the requirements for teaching

English Language Learners, leading to the same sort of pedagogical morass that followed the *Lau* Guidelines. This Court should not permit the decision below to undermine the needs of English Language Learners.

II. THE DECISION BELOW DISTORTS AND MISAPPLIES THE RELATIONSHIP BETWEEN THE EEOA AND THE NCLB.

The decision below similarly failed to understand the evolution of federal policy from the EEOA to Title III of the NCLB. The EEOA required "appropriate means to overcome language barriers." 20 U.S.C. § 1703(f). The later-passed Title III of the NCLB sets specific federal policy for what "means" are "appropriate" enough to deserve federal funding.

The *Castaneda* test is the long-standing measure of whether the EEOA is being satisfied. If the three goals of the NCLB are the same as the three prongs of the *Castaneda* test, then satisfying the NCLB means satisfying the EEOA. If that is true, the Ninth Circuit's opinion is fatally flawed.

A. The Goals of the EEOA and Title III of the NCLB Are The Same:

The *Castaneda* test requires, as shown *supra*, a recognized theory, appropriate implementation, and measurable results:

> We also laid down a three-step test for compliance with section 1703(f): Is the program based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some of the experts in the field? Is it reasonably calculated to

> implement that theory? Has it, after being used for a time sufficient to afford it a legitimate trial, produced satisfactory results?

United States v. Texas, 680 F.2d at 371.

Title III of the No Child Left Behind Act sets three goals, which are essentially the same as the three prongs of the *Castaneda* test:

- scientifically-based theory;
- adequate implementation, including teacher development; and
- measurable results.

> School districts must use Title III funds to provide high-quality language instruction programs that are based on scientifically based research, and that have demonstrated that they are effective in increasing English proficiency and student achievement.
>
> Districts are required to provide high-quality professional development to classroom teachers, principals, administrators, and other school or community-based organizational personnel in order to improve the instruction and assessment of limited English proficient students.
>
> Districts are held accountable for making adequate yearly progress as described in Title I and meeting all annual achievement objectives.

NCLB Desktop Reference, *supra*.

B. Title III Is An Individually-Focused Civil Rights Law:

The court below dismissed the requirements of Title III as only applicable to schools, and not children:

> The EEOA is just such a rights-enforcing law. It requires states "to ensure that needs of students with limited English language proficiency are addressed," *Idaho Migrant Council v. Bd. Of Educ.*, 647 F.2d 69, 71 (9th Circ. 1981), by requiring them to remove barriers to equal participation in educational programs now rather than later, and it provides students with a right of action to enable them to enforce their rights, *see*, 20 U.S.C. § 1706 . . . The EEOA's concerns, in other words, lie fundamentally with the current rights of individual students, while NCLB seeks gradually to improve their schools.

516 F.3d at 1173.

The Ninth Circuit has it backwards. To a student trapped in an ineffective bilingual education program, like Rita Montero's son, Camilo, the NCLB is a civil rights law, "requir[ing] states 'to ensure that needs of students with limited English language proficiency are addressed,' . . . by requiring them to remove barriers to equal participation in educational programs now rather than later." 516 F.3d at 1173.

The sponsors of Title III explicitly thought their changes would aid individual students in achieving equality in American society:

> Our school system should not isolate kids and not allow them to learn English. So we change the bilingual program so now the stress in bilingual education is going to be teaching kids to learn English so that they can compete in our world, compete in America, and have a shot at the American opportunity.

147 Cong. Rec. S13328 (Dec. 17, 2001)(Statement of Sen. Gregg).

In addition, Title III focuses on individual students. In March 2006, Irene Moreno, head of the English Acquisition United for the Arizona Department of Education described the four strategies she believed accounted for the demonstrated success of Nogales schools:

- small Structured English Immersion classes that emphasized English language development;
- intervention strategies to assist individual students who needed special attention;
- tutoring before, during and after school; and
- software-based evaluation providing immediate feedback on individual students' needs.

Superintendent's Br., at 26. These strategies, which satisfy Title III, are focused on the "current rights of individual students" rather than "seek[ing] to gradually improve their schools." 516 F.3d at 1173.

C. The Ninth Circuit's Approach Could Harm, Not Help, Children:

The Ninth Circuit overlooked one major purpose of Title III: to insure accountability on the basis of measurable results. One reason for this emphasis is that, under the old bilingual education programs, children were kept in these ineffective programs far longer than necessary. *See, e.g.*, H.R. Rep. 107-63, Pt. 1, at 277.

If implemented, the Ninth Circuit's "input" approach, measured by dollars spent per English Language Learner in these programs, could lead to the old result. Schools would have an incentive to

keep students in the programs longer than necessary, in order to attract more education funding. That would violate the purposes of both the EEOA and Title III of the NCLB: to teach children English and move them into parity with other students as quickly as possible.

Ironically, this perverse incentive to retain ELLs in special programs longer would run counter to the Ninth Circuit's principal criticism, noted above, that Arizona's programs do not "reclassify" students quickly enough. 516 F.3d at 1170 n. 38. Yet, history suggests that this is the likely result of the Ninth Circuit's own "put more money in" approach.

The Ninth Circuit's failure to understand the evolution of ELL education led it to a failure of analysis. This Court must understand the evolution, and the consequences, to see how these many disparate factors have come together to produce a success, not a failure, in Arizona.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request this Court to reverse the decision below.

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AMICUS CURIAE BRIEF

Nos. 08-294 and No. 08-289

IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,
Petitioner

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,
Petitioners

v.

MIRIAM FLORES, INDIVIDUALLY AND AS PARENT OF MIRIAM FLORES, MINOR CHILD; ROSA RZESLAWSKI, INDIVIDUALLY AND AS PARENT OF MARIO RZESLAWSKI, MINOR CHILD; STATE OF ARIZONA; AND MEMBERS OF THE ARIZONA STATE BOARD OF EDUCATION IN THEIR OFFICIAL CAPACITIES
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Japanese American Citizens League

Legal Aid Association of California

National Korean American Service & Education Consortium

Organization of Chinese Americans, Inc.

Sikh American Legal Defense and Education Fund

South Asian Americans Leading Together

Southeast Asia Resource Action Center

The Watsonville Law Center

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Asian American Justice Center ("AAJC")

AAJC is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. AAJC focuses its work to promote civic engagement, forge strong and safe communities, and create an inclusive society on a local, regional, and national level. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal, public policy, advocacy, and community education. A nationally recognized voice on immigration and immigrants' rights on behalf of Asian Americans, AAJC has long spearheaded advocacy and education in the community on matters affecting immigrant individuals and families. In particular, AAJC's Adult English Language Learning Program strives to shape legislative and public education policies to encourage support of English language acquisition and immigrant integration.

National Council of La Raza ("NCLR")

NCLR is a private, non-profit, non-partisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches:

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy. NCLR, which has a long history of working on behalf of English Language Learner ("ELL") students, recognizes that enforcement of the Equal Educational Opportunities Act is critical to the education of these students. Because 39 percent of Hispanic students are ELL, NCLR believes that denying educational opportunities to ELL students will have a negative effect on the educational outcomes of a large segment of the Hispanic student population.

Joining AAJC and NCLR as amici curiae in this brief are public interest, national advocacy, civil rights, and legal services organizations whose members or constituencies are affected on a daily basis by their ability to access effective ELL programs. The statements of interest for these additional *amici* are included in Appendix A.

SUMMARY OF ARGUMENT

The population of students in need of English language instruction continues to grow, state by state and nationwide. It is undisputed that English Language Learners ("ELL") who are provided with appropriate English instruction are better equipped to become productive members of society, by almost any measure. They are more likely to succeed academically, obtain a high school diploma, and facilitate the integration into the broader society of their families and communities. Despite these acknowledged benefits of effective English language instruction, the achievement gap between ELL students and their native English-speaking peers continues to grow.

The ability of ELL students to participate equally in a state's school system is a civil right, *see Lau v. Nichols*, 414 U.S. 563 (1974), and the Equal Educational Opportunities Act ("EEOA") provides an express remedy for an individual student whose rights are being violated by inadequate English language instruction. The Ninth Circuit properly affirmed the district court's holding that Arizona's arbitrary and capricious underfunding of programs for ELL students continued to violate the EEOA.

While there are many distinctions between the equality-based structure of the EEOA and the gradual, remedial framework of the No Child Left Behind Act ("NCLB"), one important difference is that the EEOA, a civil rights statute, provides individual students the right to rectify insufficient English language instruction through an express private right of action. If a state's compliance with

the NCLB were found to constitute compliance with the EEOA, the right to require a state to take appropriate action to ensure equal education for all might be lost. The Ninth Circuit properly held that the NCLB does not supersede the EEOA, and thus there was no change in law that justified providing relief from the district court's judgment.

Certain *amici* in support of Petitioners insist that the court below was influenced by a preference for bilingual instruction over English immersion instruction. There is nothing in the Ninth Circuit's opinion that would so indicate. The Court of Appeals expressed no preference for bilingual education, clearly acknowledging that determining how to educate ELL students is within a state's discretion. Such attempts to reframe the issues before this Court should be disregarded.

ARGUMENT

A. CONTINUED ENFORCEMENT OF THE EQUAL EDUCATIONAL OPPORTUNITIES ACT IS CRITICAL TO GIVE ENGLISH LANGUAGE LEARNERS A FAIR CHANCE IN OUR SOCIETY.

In the 2005-06 school year, there were more than 5 million public school students with limited English proficiency in the United States ("English Language Learners" or "ELL")[2]—today, over three-quarters of ELL elementary school students and over one-half of ELL secondary school students are native-born American citizens.[3] This reflects our multicultural society. Over 54 million people living in the United States speak a language other than English at home,[4] and nearly 3 million children between ages 5 and 17 live in households that are deemed to be "linguistically isolated," meaning that no member of the household over age 14 speaks English very well.[5] Over 10.8

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[2] NATIONAL CLEARINGHOUSE FOR ENGLISH LANGUAGE ACQUISITION AND LANGUAGE INSTRUCTION EDUCATIONAL PROGRAMS (NCELA), *The Growing Number of Limited English Proficient Students: 1995/96-2005/06* (2007), *available at* http://www.ncela.gwu.edu/policy/states/reports/statedata/2005LEP/GrowingLEP_0506.pdf.

[3] Michael Fix and Margie McHugh, *Pre K-12 Education of Immigrants and English Language Learners*, Migration Policy Institute, at 2 (2008), *available at* change.gov/page/-/open%20government/yourseatatthetable/20081217_mpi2.pdf.

[4] U.S. CENSUS BUREAU, *Language Spoken at Home for the Population 5 Years and Over*, 2006 American Community Survey, tbl.52 (2006), *available at* http://www.census.gov/compendia/statab/tables/09s0052.pdf.

[5] U.S. CENSUS BUREAU, *Language Spoken at Home for the Population 5 Years and Over*, 2006 American Community

million children between ages 5 and 17 (20.3% of the population for this age group) speak a language other than English at home, and over 2.8 million of those children speak English less than "very well."[6]

The large number of children with limited English proficiency presents an enormous challenge to our school system. Even with the major advances in equal education rights in the 55 years since *Brown v. Board of Education,* 347 U.S. 483 (1954), inequality persists in America's public school system between children who have learned English as their primary language and children who lack English proficiency.

Continued enforcement of the Equal Educational Opportunities Act ("EEOA") is critical to overcome this inequality and give English Language Learners a fair chance in our society.

1. Equal Access To Public Education Is A Fundamental Civil Right.

Since *Brown,* equal access to education has been identified as an imperative within America's public school systems. While legislatures and executives at both the state and federal level have recognized the importance of equal educational opportunity, the courts have had to play a continuing role to ensure that progress is made.

In *Lau v. Nichols,* 414 U.S. 563 (1974), this Court upheld claims made under the Civil Rights Act of

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Survey, tbl.227 (2006), *available at* http://www.census.gov/compendia/statab/tables/09s0227.pdf.

[6] *Id.*

1964 by Chinese-American students with limited English proficiency who were being denied access to educational opportunities:

> [T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education ... [b]asic English skills are at the very core of what public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education.

Id. at 566. This Court recognized in *Lau* that a student's primary language is so closely related to his or her national origin that language-based discrimination is effectively a proxy for national origin discrimination. *Id.* at 568.

In the same year as the *Lau* decision, Congress enacted the Equal Educational Opportunities Act of 1974. The EEOA prohibits discrimination against students, faculty and staff in public schools and requires that state governments take action to overcome barriers to students' equal participation in public schools. At issue in this case is section 1703(f) of the EEOA, which prohibits States from denying "equal educational opportunity to an individual on account of his or her race, color, sex or national origin by ... the failure [of] an educational agency to take appropriate action to overcome language barriers that impede equal participation by its

students in its instructional programs." 20 U.S.C. § 1703.

Since its passage, the EEOA has been instrumental in improving educational opportunities for students who are not native English speakers. However, while the EEOA requires states to take appropriate action to overcome language barriers, states do not always do so of their own accord.

2. There Is Still A Wide Achievement Gap Between ELL Students And Native English Speakers.

Notwithstanding passage of the EEOA, an achievement gap remains between ELL students and their native-English-speaking peers.

a. Providing Educational Opportunities To ELL Students Is A National Issue Not Limited To A Few States.

While the populations of five states (Arizona, California, Florida, New York and Texas) accounted for about 70 percent of the nation's ELL students in the 2003-04 school year, ELL population growth varies dramatically by state.[7] States with a recent influx of immigrants are experiencing much higher increases in their ELL student population than states that have heretofore had large ELL student populations. For example, ELL enrollment between 1995 and 2005 increased 26 percent in California, a state with a long history of receiving immigrants;

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[7] Richard Fry, *Explaining the English Language Learner Achievement Gap*, Pew Research Center (June 26, 2008), *available at* http://pewresearch.org/pubs/882/english-language-learner.

ELL enrollment during the same period expanded by 372 percent in North Carolina, a state only recently experiencing sharp gains in its immigrant population.[8]

b. Native English Speakers Continue To Outscore ELL Students On Tests.

Assessment data from the states with the highest populations of ELL students uniformly indicate that ELL students are much less likely than other students to score at or above proficient levels in mathematics, reading, and language arts.[9]

Advancements in ELL educational programs have done little to close the achievement gap between ELL students and native English-speaking students. In many subjects, this gap continues to grow. The Stanford Achievement Test, 9th Edition (the "Stanford 9"), provides for the assessment of students in grades two through eleven every year in reading, math and language (as well as other subjects at targeted grade levels). In 1998, the national percentile rank of the average ELL student score on the Stanford 9 reading and language tests was consistently 20 or more points lower than the overall student body and 16 points lower in math and spelling.[10] In social sciences, which is assessed in

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[8] Jeanne Batalova, Michael Fix, Julie Murray, *Measures of Change: The Demography and Literacy of Adolescent English Learners*, Carnegie Corporation of New York, at 12 (2007), *available at* http://www.migrationpolicy.org/pubs/Measures_of_Change.pdf

[9] Fry, *supra* note 7.

[10] While reading, language and math skills are tested in grades 2-11, Spelling is only assessed in grades 2-8.

grades nine through eleven, the average discrepancy was 21.2 points.[11]

The average achievement gap between ELL students and all students increased notably between 1998 and 2002. The Stanford 9 results over this five year period show that the gaps in reading, math and language scores between ELL students and the overall student body from grades 6-8 increased by 7.33, 8.33, and 5.67 percentage points respectively. Older students followed a different trend.

Nationwide, only 30 percent of fourth-grade ELL students are "at or above basic" in reading, compared to 71 percent of native English speakers.[12] The gap is slightly larger among eighth-graders. Similar double-digit gaps are prevalent in math, though slightly smaller among students in grade four.[13] The gaps remain relatively unchanged among high school students where achievement levels decrease over the entire student body.[14]

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[11] *See* William Myhill, *The State of Public Education and the Needs of English Language Learners in the Era of "No Child Left Behind,"* 8 J. Gender Race & Just. 393, 435-436 (2004).

[12] Mellissa Lazarin, *A Race Against the Clock: The Value of Expanded Learning Time for English Language Learners*, Center For American Progress, at 3 (Dec. 2008) *available at* http://www.americanprogress.org/issues/2008/12/pdf/ell.pdf.(citing NATIONAL CENTER FOR EDUCATION STATISTICS, *The Nation's Report Card: Reading 2007*, NCES 2007-496 (U.S. Department of Education, 2007)).

[13] *Id.* (citing NATIONAL CENTER FOR EDUCATION STATISTICS, *The Nation's Report Card: Mathematics 2007*, NCES 2007-494 (U.S. Department of Education, 2007)).

[14] *Id.* (citing NATIONAL CENTER FOR EDUCATION STATISTICS, "The Nation's Report Card: 12th-Grade Reading and

Similar results are found in the 2006 report on the No Child Left Behind Act ("NCLB"), conducted by the United States Government Accountability Office, which found that students with limited English proficiency were generally lagging behind the general student population in academic proficiency.[15] On average, only about 1 in every 3 ELL students in grades 4, 8 and 12 performed at or above the "basic" level on the National Assessment for Education Progress in reading, while nearly 3 out 4 non-ELL students in those grades performed at or above the "basic" level.[16]

The large academic gap between ELL students and native English speakers indicates that there is a clear need to implement effective instructional strategies for ELL students.

c. Effective ELL Programs Increase The Number Of High School Graduates.

Low test scores are not the only evidence of the negative impact of ineffective English language instruction. States with large ELL student populations report dismal results in high school graduation rates for ELL students. In California, for instance, 20 percent fewer ELL students passed the mandatory exit exam required to obtain a high school

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Mathematics 2005," NCES 2007-468 (U.S. Department of Education, 2007)).

[15] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, "No Child Left Behind Act: Assistance from Education Could Help States Better Measure Progress of Students with Limited English Proficiency," GAO-06-815, at 13 (July 26, 2006), *available at* http://www.gao.gov/new.items/d06815.pdf.

[16] Lazarin, *supra* note 12, at 4.

diploma than the overall student body.[17] New York reports even worse results: Only 25-30 percent of ELL students in New York graduate within four years of entering high school, compared to 71 percent of native English speakers.[18]

While these numbers paint a bleak picture, it is important to recognize that where English language instruction is effective, clear gains have been demonstrated. New York found that where its school districts permitted an additional one to two years of schooling, graduation rates for ELL students jumped to 38-44 percent. Perhaps the most salient data in support of effective English instruction is that students who have attained English language proficiency and exited out of the limited-English proficient category have even higher graduation rates than their native English speaking peers (74 percent).[19]

3. Effective ELL Programs Address The Needs Of The Changing Population of U.S. Schools.

The growing achievement gap for ELL students, and the failure of inadequate ELL education programs to close the gap are of particular concern

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[17] California Department of Education News Release #08-117, Sept. 9, 2008, tbl.1, *available at* http://www.cde.ca.gov/nr/ne/yr08/yr08rel117.asp#tab1.

[18] NEW YORK STATE BOARD OF REGENTS, *Graduation Rates: Students Who Started 9th Grade in 2001, 2002 and 2003 and 2006-07 Regents Examination Results*, (Aug. 11, 2008), *available at* http://www.oms.nysed.gov/press/documents/Gradrates06-07FINAL.ppt.

[19] *See id.*

given the rapid growth of ELL students in U.S. public schools. According to the National Clearinghouse for English Language Instruction & Language Educational Programs (the "NCELA"), the total kindergarten through 12th grade (K-12) enrollment in the United States grew less than 4 percent from the 1995-1996 school year to the 2005-2006 school year. In contrast, enrollment of students with limited English proficiency increased by over 57 percent during the same time period.[20] With the ELL student population expanding every year, it is essential that public school systems include effective ELL programs.

Providing adequate ELL programs is not only needed for first-generation immigrants in the United States. Up to 27 percent of all ELL adolescents are second generation, and 30 percent are third generation, meaning that many students educated exclusively in U.S. schools (and whose parents were educated exclusively in U.S. schools) still cannot speak English well.[21] These statistics demonstrate that poorly managed and underfunded ELL programs have failed students across multiple generations.

If states are not held to the standards for equal opportunity for ELL students the EEOA requires, the achievement gap will continue to widen as the ELL population continues to grow. Such an increase in inequality is precisely what the EEOA was enacted to prevent.

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[20] NCELA, *supra* note 2.

[21] Batalova, Fix, Murray, *supra* note 8, at 13.

B. EFFECTIVE ENGLISH LANGUAGE LEARNER PROGRAMS THAT FOCUS ON ENGLISH PROFICIENCY FOR STUDENTS ARE CRITICAL FOR SUCCESSFUL IMMIGRANT INTEGRATION.

For immigrants in the United States, proficiency in the English language is a necessary condition for naturalization, effective participation in civic engagement activities, economic self-sufficiency, and successful integration in society. A key component of implementing and effectuating English language learning and integration is dedicating resources and efforts to improving educational opportunities and programs for ELL students. Effective ELL programs that focus on helping students develop English language proficiency, as well as the necessary academic skills in other subjects that are taught in English, are critical for helping ELL students and their families become more active, productive and integrated in society.

1. English Proficiency Is Critical To Social, Economic And Familial Integration.

As the fastest growing segment of the student population in the United States,[22] the five million-plus limited English proficient students in the United States[23] increasingly require effective ELL programs in place, to provide ELL students with opportunities to develop both English language proficiency and other academic skills. Students who develop English language proficiency as children will have greater opportunities when adults to

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[22] Batalova, Fix, Murray, *supra* note 8, at 12.

[23] NCELA, *supra* note 2.

participate fully in civic engagement activities, make meaningful contributions to the broader local community, and become fully-integrated, productive members of society. The high correlation between limited English proficiency and poverty rates within immigrant communities indicates that improved English skills benefit the individual as well as his or her community and the nation as a whole.[24]

Developing effective English language skills provide ELL students the opportunity to increase their future earning potential and achieve economic self-sufficiency and stability. Further, ELL students who acquire English language skills will be better able to assist their non-English speaking family members in adapting to life in the United States and integrating into the broader society.[25] All of these potential benefits are dependent on effective ELL programs.

2. Learning English Is Most Effective When Children Are Taught As Early As Possible.

Children who fail to receive an adequate education in English are unlikely to have a second opportunity to learn English as adults. Depending on their background, their prior formal educational experiences and a host of other factors, it can take years for ELL students to develop English language

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[24] Batalova, Fix, Murray, *supra* note 8, at 31.

[25] Hoyt Bleakley and Aimee Chin, *What Holds Back the Second Generation? The Intergenerational Transmission of Language Human Capital Among Immigrants*, The Center for Comparative Immigration Studies, University of California, San Diego, at 2 (Oct. 2004), *available at* http://www.ccis-ucsd.org/PUBLICATIONS/wrkg104.pdf.

proficiency. Acquiring the competency in academic English necessary for ELL students to perform at the same academic level as their non-ELL peers takes between four and seven years.[26] Thus it is important that ELL programs focus on developing an ELL student's proficiency as early and as consistently as possible. The educational experiences and developmental activities that occur during the earlier years of a child's life play a critical role in his or her overall development.[27]

The lack of widely available and effective adult ELL programs underscores the importance and benefits of effective ELL programs aimed at developing English language proficiency for school-aged children. A survey of 184 English as a Second Language ("ESL") providers found that more than half of those providers indicated that there was a waiting list for adult ESL classes ranging anywhere from a few weeks to more than three years.[28] The tremendous demand for adult ESL classes in the

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[26] Kenji Hakuta, Yuko Goto Butler, and Daria Witt, *How Long Does it Take English Learners to Attain Proficiency?* The University of California Linguistic Minority Research Institute, at 10 (2000), *available at* *http://caselinks.education.ucsb.edu/casetrainer/CLADContent/CladLanguage/node7/theory/HowLong.pdf*

[27] *See* National Association for the Education of Young Children (NAEYC), *Screening and Assessment of Young English-Language Learners*, Supplement to the NAEYC Position Statement on Early Childhood Curriculum, Assessment, and Program Evaluation (Summer 2005), *available at* http://www.naeyc.org/about/positions/pdf/ELL_Supplement.pdf.

[28] Dr. James Thomas Tucker, *Waiting Times for Adult ESL Classes and the Impact on English Learners*, The National Association of Latino Elected and Appointed Officials Education Fund, at 13 (June 2006), *available at* http://www.naleo.org/downloads/ESLReportLoRes.pdf.

United States, coupled with the scarce supply of available ESL classes underscores the importance of developing and implementing effective programs in public schools to ensure that, by the time they become adults, ELL students will have developed the necessary English language skills and will not have to rely on adult ELL programs.

3. Effective ELL Programs Benefit Society As A Whole.

Effective English language instruction not only can provide tremendous benefit for an individual, but can have an enormous impact on society as a whole. The correlation between effective ELL instruction and the ability of a student to graduate from high school provides an excellent illustration of this point.

Without effective ELL programs, this educational gap between ELL students and English-fluent students will remain, making it difficult for ELL students to enjoy the same opportunities afforded to English-proficient students with greater academic proficiency. Effective ELL programs aimed at narrowing the educational gap between ELL student and English-fluent students can also promote greater unity and integration within a school, as the ELL students are better able to relate to their English-proficient peers and better able to assimilate and integrate into the school environment.

As the Ninth Circuit noted, an ELL student's problems extend beyond extra assistance with English. "A tenth grader, for example, who speaks no English but must pass a biology course taught entirely in English will require considerable assistance." *Flores v. Arizona*, 516 F.3d 1140, 1169

(9th Cir. 2008). Until a student is English proficient, the student will need extra assistance in all subjects.[29]

The educational gap, in turn, results in lower graduation and matriculation rates for ELL students,[30] which in turn are tied to lower future earning potential for such ELL students.[31] Viewed strictly from the standpoint of enabling an individual ELL student to improve his or her quality of life, the impact is stark: a high school diploma results, on average, in an additional $8,580 in income per year.[32]

The lifelong impact of a failed ELL education has a financial effect on a student's community, the state, and the nation as a whole. As identified *supra*,

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[29] "It is not an easy undertaking to learn and excel in math, reading and language arts, science, and other core academic subjects that have become integral to a college and work-ready curriculum, all while learning a new language." Lazarin, *supra* note 12, at 17.

[30] *See* NEW YORK STATE BOARD OF REGENTS, *supra* note 18 (finding that only 25 to 30 percent of ELL students in New York graduate within four years of entering high school, compared to 71 percent of non-ELL students); and *see also* M.M. McMillen, P. Kaufman, & S. Klein, *Dropout rates in the United States: 1995*, Washington, DC: U.S. Department of Education, Office of Educational Research and Improvement, NCES 97-473 (1997) (finding that, in 1995, students who reported that they did not speak English well had a 32.9% dropout rate, compared to 19.2% dropout rate for students who reported speaking English well or very well).

[31] U.S. CENSUS BUREAU, *Earnings Gap Highlighted by Census Bureau Data on Educational Attainment*, (2007), *available at* http://www.census.gov/Press-Release/www/releases/archives/education/009749.html.

[32] BUREAU OF LABOR STATISTICS, *Employment Projections: Pays to Play*, (March 6, 2009), *available at* http://www.bls.gov/emp/emptab7.htm

California reports that 20 percent fewer ELL students passed the mandatory exit exam required to obtain a high school diploma, when compared to the overall student body.[33] California taxpayers lose $169,000 in additional tax revenues over the lifetime of an individual who fails to obtain a high school diploma.[34]

Further, the community at large sees a reduced burden on expenditures relating to crime, health, and welfare when more students graduate. Only 25-30 percent of ELL students in New York graduate within four years of entering high school, compared to 71 percent of native English speakers.[35] For each new ELL high school graduate, New York saves $15,993 in Medicaid and uninsured costs.[36] Viewed another way, a 5 percent increase in male high school graduates nationwide could result in crime-related savings of $4,939,017,909 *on an annual basis*, in addition to the related intangible benefits of lowering the crime rate.[37]

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[33] California Department of Education News Release #08-117, September 9, 2008 tbl.1, *available at* http://www.cde.ca.gov/nr/ne/yr08/yr08rel117.asp#tab1.

[34] Clive R. Belfield and Henry M. Levin, *The Return on Investment for Improving California's High School Graduation Rate*, California Dropout Research Project, at 2 (Aug. 2007) (affiliated project of University of California Linguistic Minority Research Institute), *available at* http://www.cbcse.org/media/download_gallery/California%20Dropout%20Study%20Report%202FINAL.pdf.

[35] NEW YORK STATE BOARD OF REGENTS, *supra* note 18.

[36] Jason Amos, *Dropouts, Diplomas, and Dollars: U.S. High Schools and the Nation's Economy*, Alliance for Excellent Education, at 39 app.3 (August 2008), *available at* http://www.all4ed.org/files/Econ2008.pdf.

[37] *Id.* at 38 app.2.

While an individual ELL student's right to an equal education should be reason enough to implement and maintain effective English instruction, it is important to recognize that a failure to provide appropriate English instruction has serious social and economic costs as well.

C. THE COURT SHOULD NOT CONSIDER COMPLIANCE WITH THE NCLB EQUIVALENT TO COMPLIANCE WITH THE EEOA.

Petitioners argue that the NCLB's statutory scheme supplements the purpose of the EEOA and defines the EEOA's "appropriate action" requirement, such that compliance with the NCLB equates to compliance with the EEOA. Although both the EEOA and the NCLB attempt to advance the achievement of ELL students, the two statutes seek advancement by entirely different means that cannot be interpreted coterminously. Many of these reasons are discussed in Respondents' briefs. However, an area of particular importance to *amici* is the EEOA's private right of action, which permits an individual citizen to bring suit in order to enforce the rights ensured by the EEOA. The NCLB contains no such express right, nor should this testing-based law be burdened with the additional obligation of protecting the civil rights of ELL students.

The EEOA, in part, ensures that ELL students have equal access to education by allowing individual students to bring private causes of action for any violation of the Act. Section 1706 of the EEOA states that "an individual denied an equal educational opportunity...may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be

appropriate." 20 U.S.C. § 1706. Since the enactment of the EEOA, ELL students have used this private cause of action under the statute to guarantee equal access to education in order to overcome language barriers. *See e.g. Gomez v. Illinois State Bd. of Education,* 811 F.2d 1030 (7th Cir. 1987); *Morales v. Shannon*, 516 F.2d 411 (5th Cir. 1975).

Specifically, an ELL student may bring suit against an educational agency that fails "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). Conversely, the NCLB does not appear to offer such method of enforcing individuals' rights. "The No Child Left Behind Act does not create a private right of action." *Alliance for Children v. City of Detroit Public Schools,* 475 F.Supp.2d 655, 657 (E.D. Mich. 2007). "The NCLB[] provides no procedure for individual entities [] to enforce its requirements: the Act's only 'penalties' provision allows the Secretary of Education to withhold funds from states that do not meet the Act's requirements." *Fresh Start Academy v. Toledo Board of Education,* 363 F.Supp.2d. 910, 914 (N.D. Ohio 2005).[38]

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[38] Petitioner Superintendent states that the NCLB permits individual students to file an administrative complaint if their programs are inadequate, which complaint ultimately could be resolved by the Department of Education. Brief for the Petitioner Superintendent at n.23. However, the NCLB itself provides no specific procedures for the resolution of complaints, leaving that up to the individual states to implement. 20 USCS § 7844 (each state will "adopt and use proper methods of administering each such program, including ... the adoption of written procedures for the receipt and resolution of complaints alleging violations of law in the administration of the programs"). Thus, the procedures, rights and remedies

Further comparisons between the NCLB and the EEOA confirm the insufficiency of the NCLB to address the issues contemplated by and addressed in the EEOA to protect the important educational rights of each student.[39] First, and perhaps most significantly, states and school districts *are not required to comply with the NCLB*. Individual states or school districts may choose to opt out. See 20 U.S.C. § 7907(a) ("[n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act"). If the EEOA is overridden and its private right of action eliminated, students in states that have opted out of the NCLB (or may do so in the future) will have no recourse against a discriminatory school system.

Further, technical aspects of the NCLB can adversely affect ELL students. The NCLB designates four groups of students for particular focus, one of which comprises students who are

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available to a student to rectify an inadequate ELL program could vary significantly from state to state and cannot be considered equivalent to the private right of action under the EEOA.

[39] Petitioners Speaker of the Arizona House of Representatives and President of the Arizona Senate assert that they are not arguing for the implicit repeal of the EEOA. Brief for Petitioners at 60. However, if the Court accepts that a school district meeting NCLB-standards is *de facto* complying with the EEOA, the outcome for underserved ELL students in that district is an implied repeal of the EEOA's private right of action. Petitioners admit as much, stating that the EEOA will be limited to providing protection "particular schools or school districts engag[ing] in *individual* instances of discrimination". Brief for Petitioners at 60. Petitioners' argument severely curtails the purpose of the EEOA.

limited in English proficiency. However, ELL students are only considered to be an "accountability group" if a "minimum group number" of ELL students attend a school district where the NCLB has been adopted.[40] That minimum group number is determined at the school district's discretion. Thus, if the school district's group number for ELL students is 50, but only 49 ELL students attend that school, NCLB provides no accountability for language access to those 49 children. If the NCLB were construed to supersede the EEOA, ELL students could face an untenable circumstance where they are not receiving adequate English language instruction, and yet have no ability to require their school district to improve (or even offer) such instruction. Perversely, because such a district would not be accountable for language access provided to the students who fall outside of the accountability group, the school district would have no incentive under the NCLB to offer such programs.

Another example comes from the methods by which Petitioners contend Arizona's compliance can now be assessed: mandatory testing pursuant to the NCLB's requirements. While the NCLB permits states to offer native language assessments or alternative assessments for testing ELL students to capture better a student's grasp of content, Arizona declines to offer either accommodation.[41]

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[40] U.S. DEPARTMENT OF EDUCATION, *Fact Sheet: NCLB Provisions Ensure Flexibility and Accountability for Limited English Proficient Students*, (last modified Feb. 19, 2004), *available at* http://www.ed.gov/nclb/accountability/schools/factsheet-english.html.

[41] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 15, at 33-34.

Appropriate testing and assessment of ELL students has been controversial, and the alternatives offered under the NCLB are adopted inconsistently among the participating states, thus making data concerning the progress of ELL students impossible to compare. It appears likely that such issues will continue to arise. The Government Accountability Office's July 2006 Report, "No Child Left Behind Act: Assistance from Education Could Help States Better Measure Progress of Students with Limited English Proficiency," reports that

> [The Department of] Education has issued little written guidance on how states are expected to assess and track the English proficiency of [limited English proficient] students, leaving state officials unclear about Education's expectations ... [M]any of the state and district officials we interviewed told us that the current flexibilities do not fully account for some characteristics of certain students in this student group ... .[42]

Further, there is conflict among state officials over how ELL students should be tested going forward. Some state officials seek longer exemptions from testing for ELL students, while others think that ELL students should be excluded from testing altogether until they demonstrate appropriate English skills.[43] If the Department of Education were to permit such accommodations (and they may; the purpose of the GAO's report was to suggest to the Department of Education that further accommodation may be warranted), the NCLB-

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[42] *Id.* at 41.

[43] *Id.* at 48.

related testing that Petitioners assure the Court will satisfy the requirements of the EEOA may disappear altogether for ELL students.

Finally, under the NCLB, states are permitted to establish their own academic content, develop their own tests to measure performance, and set standards for what constitutes proficiency.[44] The process is completely insular, with minimal oversight or consequence unless a state's students fail to meet those standards. Consequently, a state whose students are meeting the criteria established by that state satisfies the requirements set forth by the NCLB. However, if that state were nonetheless failing to take appropriate action to overcome language barriers, the affected students would have no ability to rectify their situation, as the NCLB contains no private right of action.

Because the fundamental purpose of the EEOA is different from the NCLB, compliance with the NCLB alone cannot constitute compliance with the EEOA. The NCLB determines compliance by measuring student performance as a whole. The essence of the EEOA's private right of action is to ensure that each *individual* student receives equal educational opportunities, independent of the individual's group affiliation. That right should not be abrogated. Had Congress intended to overturn the EEOA, it could have easily said so, but it did not. Instead, the NCLB explicitly provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847. The EEOA guarantees civil rights to individual students. Having those rights depend

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[44] *Id.* at 9.

upon compliance with a gradual performance statute like the NCLB is inconsistent with the purpose of the EEOA. The EEOA and the NCLB both serve very important purposes in advancing ELL instruction in the United States. However, it is important that those purposes remain distinct.

D. AMICI IN SUPPORT OF PETITIONER IMPROPERLY SEEK TO REFRAME THIS CASE INTO A DEBATE ABOUT EDUCATIONAL THEORY.

In their briefs in support of Petitioners, *amici* improperly seek to politicize the issues before this Court by debating the effectiveness of bilingual education as compared to other theories of teaching English to non-native speakers. The merits of bilingual education (as opposed to an English-immersion style of teaching, currently required by law in Arizona) are not at issue here. The only salient consideration is whether the method adopted by the state provides ELL students with an adequate education under the EEOA.

The Ninth Circuit did not require that any particular theory of English education be imposed on the Nogales school district. Indeed, the school district is required only to employ an effective means of English instruction. The Ninth Circuit recognized that:

> Shortly after the injunction [ordering Arizona to prepare a cost study to establish the proper appropriation to implement ELL programs], in November 2000, Arizona voters approved two propositions that altered Arizona's school funding and ELL programs. Proposition 203 largely abolished bilingual

> education, replacing it with sheltered English immersion ... Proposition 301 increased school funding generally in Arizona through a sales tax increase.

Flores at 1149. Further, the Ninth Circuit focused its analysis of "changed facts" on policy changes implemented by the "successful management" of Kelt Cooper and his successor, Dr. Guilermo Zamudio, and resultant testing scores, funding issues, and conditions in comparable districts. The Ninth Circuit did not base its analysis in any way on the possible merits of a bilingual education, nor did it criticize Arizona's current policy of English-immersion education, simply stating that while "Arizona's theory of ELL instruction has changed over the years, the enormous importance of such programs to students and parents in Nogales has not." *Flores* at 1145.[45] The Ninth Circuit's holding does not rely in any way upon an evaluation of the *method* of providing English language instruction to its students, because neither petitioner nor respondent focused the Court on the issue. Rather, the Court's focus was (appropriately) on whether ELL programming funds are sufficient (as that was

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[45] This is not to say that the Ninth Circuit did not recognize that there had been a policy shift following the passage of Proposition 203: "[A]fter 2000, when Arizona moved away from bilingual education and required most courses to be taught in English, regardless of students' language abilities, these challenges have become greater: A tenth grader, for example, who speaks no English but must pass a biology course taught entirely in English will require considerable assistance." *Flores* at 1169. The Ninth Circuit does not criticize English immersion educational theories, but rather makes a valid point about the resources required for effectively transforming theory into reality.

the method of compliance originally adopted by the state). The Ninth Circuit did not review the way in which ELL students were being educated, leaving that up to the state's discretion. Rather, the Court reviewed whether or not there had been a change of fact that might relieve Arizona from the final judgment.

Thus, it is clear that *amici* are mistaken when they state that the Ninth Circuit erred as a result of its alleged "failure to understand the evolution in methods for teaching English Language Learners,"[46] and by "substituting its own preference for educating Arizona's students for the validly enacted policy of the people of Arizona."[47] *Amici* The Eagle Forum's conclusory statement that "prior federal statutory acceptance of English immersion would support the appropriateness of Arizona's academic success"[48] is not supported. Rather, these attempts to inflame passions over immigration or English-only policies are a disservice to Arizona's ELL students. Arizona has failed to take appropriate action to overcome language barriers that impede equal participation by its students in educational programs. This is a violation of the EEOA, regardless of whether the failure occurs in the process of teaching ELL students via an English-immersion program or through bilingual education. The Court should not

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[46] Brief of the American United Legal Defense Fund, English Language Political Action Committee, ProEnglish and the Center for Opportunity, as *Amici Curiae* Supporting Petitioners, at 2.

[47] Brief Amicus Curiae of Pacific Legal Foundation and Evergreen Freedom Foundation in Support of Petitioners, at 3.

[48] Brief *Amicus Curiae* of Eagle Forum Education & Legal Defense Fund, Inc., In Support of Petitioners, at 5-6.

consider these incendiary proclamations by *amici* for Petitioners, which do not bear on the issues here.

Finally, alarmist stories of disaster resulting from mistranslations of English phrases[49] do not inform the issue before the Court, unless it is to emphasize the importance of adequate programs for ELL students. To the extent they are relevant at all, *amici*'s examples highlight the tragic results of inadequate English language instruction. It is indeed ironic for these examples to be cited as examples for why Arizona should be permitted to continue flaunting the federal judgment in place against it by continuing to underfund ELL programs.

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[49] Brief *Amicus Curiae* of Eagle Forum Education & Legal Defense Fund, Inc., In Support of Petitioners, at 17-18 n.3.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Attorneys for Amici Curiae

APPENDIX

APPENDIX A

List Of *Amici Curiae*

Asian American Institute (AAI)
AAI is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, by utilizing coalition building, education, and research. AAI's programs include community organizing, leadership development, and legal advocacy. Asian Americans are a diverse and often overlooked community, but they are one of the fastest-growing populations in the United States. In today's diverse society, it is crucial to eradicate language access barriers faced by the Asian American community at health care institutions, polls, and schools. Because AAI recognizes the importance of effectively educating English Language Learners, AAI has a strong interest in the outcome of this case.

Asian Law Caucus (ALC)
Founded in 1972, ALC is a non-profit organization advancing the legal and civil rights of Asian American and Pacific Islander communities. It is the nation's oldest legal organization serving Asian Americans and is dedicated to the pursuit of equality and justice for all sectors of society. We advocate for equal access to all public services regardless of English language ability and focus on the needs of Asian immigrants in particular.

Asian Pacific American Legal Center of Southern California (APALC)

APALC was founded in 1983 and is the nation's largest non-profit public interest law firm devoted to the Asian Pacific American community. Serving 15,000 individuals and organizations each year, APALC has expertise in workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights, and hate crimes. APALC represents and advocates for limited English proficient individuals through public advocacy, community education, and litigation to ensure adequate language services to immigrants.

Asian Pacific American Legal Resource Center (APALRC)

APALRC is the Capital Region's non-profit advocate advancing the legal and civil rights of Asian Pacific Americans through direct services, education, and advocacy. The APALRC addresses the individual legal needs of low-income and limited English proficient Asian Pacific Americans and advocates for broad-based systemic change on legal and civil rights issues impacting Asian Pacific Americans. The APALRC joins *amici* seeking to ensure equal and meaningful access to education for limited English proficient individuals.

Boat People SOS (BPSOS)

BPSOS is a national immigrant services organization serving primarily Vietnamese refugees and immigrants with 13 branch offices nationwide. BPSOS' domestic operation includes a large array of human and immigration services for Vietnamese refugees and immigrants. Upon immigrating to the United States, most older Vietnamese have limited English proficiency, if any. The children of these immigrants need the additional assistance in the

American educational system to learn the language and to assimilate into American culture and take full advantage of the opportunities this country has to offer. It is because of this interest BPSOS participates in the brief.

California Rural Legal Assistance Foundation (CRLAF)

CRLAF is a non-profit legal services organization representing farm workers and other low income immigrant families in rural California. The majority of CRLAF clients are not English speakers and are representative of the diversity of farm workers in California, speaking not only Spanish, but a variety of indigenous languages. For over 30 years CRLAF has advocated for the rights of English learners in California schools through legislative advocacy and has represented farm worker families in actions brought under the EEOA and in writ proceedings seeking to compel state and local officials to comply with the independent mandates of the NCLB.

Child Care Law Center (CCLC)

CCLC is a public interest, non-profit law firm that uses legal tools to make high quality, affordable early childhood education available to every child, family and community. As a legal services support center, CCLC focuses particular attention on families who face barriers in securing and maintaining quality early childhood education: low-income families, limited English proficient parents and their English Language Learner children, families and children with disabilities and special health care needs, and other vulnerable families. CCLC directly serves clients who are affected by a lack of access to English language learning in early education

settings and provides technical assistance to legal services programs throughout the state of California working on issues of access and support for young English Language Learners. CCLC joins this amicus brief to help ensure English Language Learner and limited English proficient children have meaningful access to education.

Coalition of California Welfare Rights Organizations (CCWRO)

CCWRO is a private, non-profit organization established in 1982 as a statewide public interest non-profit law firm which specializes in poverty law, including civil rights law, and advocates on behalf of limited English proficient individuals in California to ensure that they have meaningful access to government programs, services, and benefits as required by Title VI of the Civil Rights Act of 1964. This is vital for refugees and limited English-speaking persons to become self-sufficient and end reliance on public benefits.

Empire Justice Center

The Empire Justice Center is a statewide public interest non-profit law firm which specializes in civil rights law and advocates on behalf of limited English proficient individuals in New York to ensure that they have meaningful access to government programs, services, and benefits as required by Title VI of the Civil Rights Act of 1964. The Empire Justice Center is a member of the National Language Access Advocates Network (N-LAAN), a national organization that supports and engages in effective advocacy to eradicate discrimination based on language.

Isabel Framer

Isabel Framer is CEO of Language Access Consultants, LLC in Copley, Ohio. Ms. Framer is a national expert on language access, an Oregon and Tennessee-certified judiciary interpreter, author, and Chair of the National Association of Judiciary Interpreters and Translators. She has served on the Interpreter Services Subcommittee of the Supreme Court of Ohio's Racial Fairness Implementation Task Force and on the Board of the Racial Fairness Project in Cleveland, Ohio. Through consulting and policy work, particularly with regard to court, law enforcement, domestic violence and other legal and quasi-legal settings, Ms. Framer seeks to improve language access for Limited English Proficient communities. She joins this amicus brief because the effective education of English Language Learners has broad implications for their full and equal access to justice.

The Fred T. Korematsu Center for Law and Equality (Korematsu Center)

The Korematsu Center is a non-profit organization based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to successfully challenge his conviction and to champion the cause of civil liberties and civil rights

for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all. It has a special interest in safeguarding language rights to ensure educational and economic opportunities so that everyone can participate fully in our nation's democratic traditions. We note that the Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

Hmong National Development, Inc. (HND)
HND is a national, non-profit organization developing capacity to ensure the full participation of Hmong in society. HND works with local and national organizations, public and private entities, and individuals to promote educational opportunities, to increase community capacity, and to develop resources for the well-being, growth, and full participation of Hmong in society. Historically, we have provided advocacy on behalf of Hmong refugees who face barriers to opportunities in society due to lack of resources and language abilities.

Japanese American Citizens League (JACL)
The JACL, founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan civil rights organization with 113 chapters throughout the continental United States, Hawai'i, and Japan. It consistently strives to uphold the civil and human rights of Americans of Japanese Ancestry and of all people. The JACL has held a prominent role in obtaining redress for Japanese Americans who were interned during World War II. Currently it works to educate against and combat discrimination on the basis of race, national origin, age, ethnicity, gender, or disability, and to protect

the right of all persons to equal participation in educational programs. Since *Brown v. Board of Education,* the JACL has maintained a strong position in protecting civil rights and protecting equal educational opportunities. *Amici* thus has an important and substantial interest in this case.

Legal Aid Association of California (LAAC)
LAAC is a statewide membership association of over 80 non-profit public interest law organizations, which provide free civil legal services to low-income persons and communities throughout California, and over 90 individual staff members and supporters of such programs. The mission of LAAC (which is itself a non-profit corporation) is to ensure the efficient and coordinated delivery of legal services to indigent and disadvantaged persons throughout California, and to provide an effective and unified voice for its members on issues of concern to the statewide justice community. LAAC member organizations provide legal assistance on a broad array of substantive issues, ranging from general poverty law to civil rights to immigration, and also serve a wide range of poor, disadvantaged, and vulnerable populations. Many of LAAC's organizational members serve clients who are affected by a lack of access to English language learning. LAAC supports the goals and missions of N-LAAN.

National Korean American Service & Education Consortium (NAKASEC)
NAKASEC is a national non-profit organization based in Los Angeles with a Washington, D.C. office. NAKASEC's affiliates are the Korean American Resource & Cultural Center in Chicago and the Korean Resource Center in Los Angeles. Founded in

1994, NAKASEC is a multi-issue civil rights and human rights organization based in the Korean American community. NAKASEC's mission is to project a national progressive voice for Koreans Americans and promote their full participation in the United States. To this end, NAKASEC promotes equitable and just changes to the political and legislative systems through a combination of education and policy advocacy with grassroots organizing and community mobilization.

Organization of Chinese Americans, Inc. (OCA)
OCA is a 501(c)(3) national non-profit, non-partisan organization dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans in the United States. With over 80 chapters and affiliates across the nation, OCA's aims are to advocate for social justice, to promote civic participation, to advance coalitions and community building, and to foster cultural heritage. OCA monitors issues and policies that affect the Asian Pacific American community. To ensure the progress of all members of this diverse community, OCA champions programs that support the inclusion and integration of those with educational and language needs.

Sikh American Legal Defense and Education Fund (SALDEF)
SALDEF is the oldest Sikh American civil rights and advocacy organization in the United States. Founded as the Sikh Mediawatch and Resource Task Force (SMART) in 1996, SALDEF empowers Sikh Americans through legal assistance, educational outreach, legislative advocacy, and media relations. SALDEF's work with other Sikh and minority

organizations includes extensive experience providing advocacy and community education on immigration issues. SALDEF has a strong interest in advancing opportunities for Sikh Americans by eliminating language barriers.

South Asian Americans Leading Together (SAALT)
SAALT is a national non-profit organization whose mission is to promote the full and equal civic and political participation of South Asians in the United States. More than 2.7 million South Asians reside in the United States, many of whom speak limited English and confront linguistic barriers in obtaining basic services and benefits. SAALT joins this *amicus* brief to help ensure that resources are provided to English Language Learner and limited English proficient students in order to obtain meaningful access to education.

Southeast Asia Resource Action Center (SEARAC)
SEARAC is a national non-profit organization advancing the interests of Southeast Asian Americans through leadership development, capacity building and community empowerment. Established in 1979 to assist with the resettlement of the largest group of refugees to the United States from Southeast Asia, SEARAC continues to be a leading advocate for these communities. SEARAC has been a strong advocate on student rights, particularly for English language learners and their access to high quality instruction and educational services. Through our work on K-12 education issues with congressional and federal policy makers and with Southeast Asian American families who are directly affected, we recognize the unfair and harmful impact our current education policies have on our

communities across the United States. As such, we support AAJC in its submission of this brief to highlight the consequences of inadequate resources for the instruction of non-native English-speaking students and their families.

The Watsonville Law Center (WLC)

WLC is a private, non-profit, legal services organization established in 2002 to provide low-income individuals equal access to the law by assisting them to understand, exercise and enforce their rights. WLC serves a primarily monolingual Spanish-speaking farmworker community in an agricultural region. WLC addresses legal barriers faced by immigrant and other low-income individuals as they strive to access health and financial sustainability. English language proficiency increases access to justice, strengthens low-income families and improves their economic prospects over time. WLC joins this *amici* brief to help ensure the thousands of children in our community who are English language learners have the resources and opportunities necessary to obtain a meaningful education for a prosperous future.